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No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

IN RE AIR CRASH DISASTER AT MALAGA, SPAIN,
ON SEPTEMBER 13, 1982

MDL-530

This Document Relates To:

MARIA DE LA LASTRA PETRIRE, Individually as surviving wife and on behalf of the Heirs at Law and Distributees of the Estate of Carlos Lazcano Conrado, deceased; MARIA LAZCANO DE LA LASTRA, CARLOS LAZCANO DE LA LASTRA, INIGO LAZCANO DE LA LASTRA and VICTORIA LAZCANO DE LA LASTRA, infant children of Carlos Lazcano Conrado, deceased, by their mother and natural guardian MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

FRANK H. GRANITO, JR.
200 Park Avenue
New York, New York 10166
(212) 661-0011
Counsel for Petitioner

SPEISER & KRAUSE, P.C.
Of Counsel

Question Presented

Whether this Court should define the jurisdictional limits of the treaty governing international air transportation; specifically, in the context of the petitioner's case, was it error for the court below to affirm the order of the district court dismissing petitioner's wrongful death action against respondent air carrier for lack of treaty (subject matter) jurisdiction under Article 28(1) of the Warsaw Convention notwithstanding the fact that petitioner's decedent sustained fatal injury while enroute to the United States and while travelling aboard respondent's aircraft pursuant to a ticket listing New York as his "place of destination"?

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OCTOBER TERM, 1984

IN RE AIR CRASH DISASTER AT MALAGA, SPAIN,
ON SEPTEMBER 13, 1982

MDL-530

No. ____

This Document Relates To:

MARIA DE LA LASTRA PETRIRE, Individually as surviving wife and on behalf of the Heirs at Law and Distributees of the Estate of Carlos Lazcano Conrado, deceased; MARIA LAZCANO DE LA LASTRA, CARLOS LAZCANO DE LA LASTRA, INIGO LAZCANO DE LA LASTRA and VICTORIA LAZCANO DE LA LASTRA, infant children of Carlos Lazcano Conrado, deceased, by their mother and natural guardian MARIA DE LA LASTRA PETRIRE,

Petitioner,

—against—

SPANTAX, S.A.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Opinions Below

The Opinion of the United States Court of Appeals for the Second Circuit appears in the Appendix to this Petition (App. 1a-7a) and is reported at 756 F.2d 263 (2d Cir. 1985). The opinion of the United States District Court for the Eastern District of New York also appears in the Appendix (App. 8a-11a) and is reported at 577 F.Supp 1013 (E.D.N.Y. 1984).

Jurisdiction

The petition for rehearing was denied by the United States Court of Appeals for the Second Circuit on April 8, 1985. (App. 12a-13a). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) (1985).

Treaty Involved

The provision of the Warsaw Convention[1] involved is Article 28. It provides:

> (1) An action for damages must be brought at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or his principal place of business or where he has a place of business through which the contract has been made, or before the court at the place of destination.

49 Stat. 3020.

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1 Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929. 49 Stat. 3000 (1934), T.S. No. 876, 137 L.N.T.S. 11 reprinted in 49 U.S.C. § 1502 note (1976) [Warsaw Convention].

Statement of the Case

Petitioner Maria De La Lastra Petrire is a citizen and domiciliary of Spain as was her late husband, Carlos Lazcano Conrado.

Respondent Spantax, S.A., the holder of a foreign air carrier permit issued by the Civil Aeronautics Board (CAB), is a privately owned Spanish corporation that is authorized to engage in charter operations between Spain and the United States.

The action for the death of petitioner's husband is one of over 200 passenger personal injury and/or death actions commenced in the United States against defendant respondent Spantax, S.A. as a result of the crash of respondent's DC-10 aircraft at Malaga, Spain on September 13, 1982 during a planned flight from Madrid to New York.

Pursuant to the provisions of 28 U.S.C. 1407, Petitioner's action was consolidated with other actions arising out of the Malaga disaster by order of the Judicial Panel on Multidistrict Litigation and assigned to Hon. Eugene H. Nickerson of the United States District Court for the Eastern District of New York, *In Re Air Crash Disaster at Malaga, Spain on September 13, 1982* (MDL Docket No. 530).

In the wake of *In Re Air Crash Disaster at Warsaw, Poland on March 14, 1980* (2d Cir. 1983), 705 F.2d 85, *cert. denied* (1983) 464 U.S. ____, 104 S.Ct. 147, 78 L.Ed.2d 138 (imposing absolute unlimited liability on a defendant air carrier that failed to comply with the ticket format requirements of the Montreal Agreement),[2] respondent Spantax, S.A. agreed not to contest liability while reserving the right to move on jurisdictional grounds against several complaints filed in the United States, including that filed on behalf of Petitioner herein.

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2 Agreement CAB 18900, approved by CAB Order E-23680, 31 Fed. Reg. 7302 (1966).

The jurisdictional facts bearing on respondent's Rule 12 motion to dismiss Petitioner's complaint were contained in an affidavit by a Spantax ticket agent which, in sum, said: Two consecutively numbered tickets were issued simultaneously but separately for the benefit of petitioner's husband in two distinct ticket booklets; one ticket covering the flight from Madrid to New York on September 13, 1982 and the second ticket for the planned return flight five days later. The tickets were issued at the direction of respondent carrier's president with whom decedent apparently dealt. Having no personal knowledge of the ticket transaction, petitioner conceded that her husband's intended stay in the United States was temporary and that the ticket arrangements made for his travel to the United States occurred in Spain, the *locus* of respondent's domicile, corporate headquarters and operations base. Under these circumstances, and notwithstanding expert evidence to the contrary,[3] the district court concluded that decedent's separate tickets comprised a single contract of carriage involving a round trip journey with Spain as the intended destination.[4]

Accordingly, under the authority of *Smith v. Canadian Pacific Airways, Ltd.* (2d Cir. 1971), 452 F.2d 798 and *Gayda v. LOT Polish Airlines* (2d Cir. 1983), 702 F.2d 424, the complaint was dismissed for lack of treaty (subject matter) jurisdiction as mandated by Article 28(1) of the Warsaw Convention in that the United States, *inter alia*, was not "the

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3 Petitioner's attorneys submitted an opinion affidavit by a domestic airline official, to which pertinent portions of the International Air Transport Association (IATA) Ticketing Handbook were attached, for the purpose of establishing that under industry custom and practice two one-way tickets constitute two separate contracts of carriage.

4 In the evidentiary sense, considering (1) the requirements of FRCP 56, let alone FRCP 12, (2) the fact that the action was one for wrongful death in which the air carrier had exclusive possession of the facts, (3) the impact of New York's "dead man's statute", CPLR 4519, (4) the self serving double hearsay nature of the supporting affidavit, (5) defendant's burden of proof, *Manion v. Pan American World Airways, Inc.* (1982), 55 N.Y.2d 398, 449 N.Y.S.2d 693, and (6) industry practice, it is believed an intent to enter separate contracts should have been presumed.

place of destination". The Court of Appeals affirmed, citing with approval *Butz v. British Airways* (E.D. Pa. 1976), 421 F.Supp. 127, *aff'd without opin.* (3d Cir. 1977), 566 F.2d 1168.

Reasons for Granting the Writ

The Warsaw Convention was drafted at the dawn of the air age to achieve uniform treatment of passengers travelling in international air transportation, *Trans World Airlines, Inc. v. Franklin Mint Corp., et al* (1984), 462 U.S. 1118; 104 S.Ct. ____, 80 L.Ed.2d 273, unoff. Rptd. 18 Avi CCH 17,778. Yet, in the ensuing years, provisions of the treaty have been interpreted often with incongruous result and sometimes in a way that is in conflict with the notion of uniformity. See, Lowenfeld *Aviation Law*, 2d Ed. (1981), M. Bender, New York § 2.5 pp. 7-49 to 53 and compare *Noel v. Linea Aeropostal Venezolana* (2d Cir. 1957), 247 F.2d 677, *cert. denied*, 355 U.S. 907 to *Benjamins v. British European Airways* (2d Cir. 1978), 572 F.2d 913, *cert. denied*, 439 U.S. 1114 (1979).

One of the more peculiar, if nc. inexplicable interpretations, is that which treats a passenger's departure as his destination for the purposes of Article 28(1), usually with the effect of depriving a litigant of an American venue, *Butz v. British Airways*, *supra*; *Galli v. RE-AL Brazilian International Airlines* (Sup. Queens 1961), 29 Misc.2d 499, 211 N.Y.S.2d 208. Such incongruity is exemplified by the dismissal of petitioner's complaint, *Petrire v. Spantax* (2d Cir. 1985), 756 F.2d 263.

In the interest of achieving rational uniformity in passenger treatment, petitioner respectfully requests that the treaty provision prescribing national venue be examined by this Court in the light of modern times and the original intent of those who drafted Article 28(1).

Petitioner contends that since the framers of the Warsaw Convention intended to establish a cause of action in favor of an injured passenger or his estate sounding in contract, Calkins, *The Cause of Action Under the Warsaw Convention*,

26 J. Air L. & Com. 217 (1959), the purpose of Article 28(l) was to assure that actions brought under the Warsaw Convention would come before the forums of the High Contracting Parties as opposed, in the words of the delegate from Great Britain, to those forums of ". . . far-off countries, where the courts really are not well organized", English text quoted by Prof. Lowenfeld, *Aviation Law*, *supra*, at p. 7-50, citing II Conference International de Droit Prive Aerien 4-12 October 1929 (Warsaw Proceedings), at 77-79; see also Calkins, *The Cause of Action Under the Warsaw Convention*, *supra*, at 229. Thus, with respect to transportation between two High Contracting Parties, petitioner respectfully submits that the intent of the framers was to give the plaintiff the option of bringing suit in the country where the transportation originated or in the country to which the passenger was journeying.

Petitioner's position finds support in the comment of the delegates who spoke in favor of the British proposal to eliminate the *situs* of the accident as one of the contractual forums. Mr. Ripert of France observed that ". . . when there is involved . . . a traveler who has entered into a contract and . . . has placed himself under the governing rules of the convention . . . , there is no reason at all for that person to go trying his case before any old court which happens, by chance, to be the court of the place of accident", Warsaw Proceedings, pp. 77-79, English text quoted by Calkins, *supra*, at 230. In his supporting statement, Mr. Pittard of Switzerland spoke of the contractual forums as "the court of the place of departure *or arrival*" (emphasis added), Calkins, *supra*.

The narrow hyper-technical and, it is submitted, illogical construction of Article 28(1) expressed in *Butz v. British European Airways*, *supra* and embodied in the opinions of the lower courts in this case, which treats the passenger's place of departure as his destination, originates with an English case decided nearly fifty years ago, *Grein v. Imperial Airways, Ltd.*, 1 K.B. 50 (1937); 55 L.I.L.R. 318; 106 L.J.R. 109 (Ct. of App. England 1936); unoff. Rptd. in 1 Avi CCH 622. In that case, the decedent passenger was killed in Belgium on a flight

between London and Antwerp. Since Belgium, at the time of the crash in 1933, was not one of the High Contracting Parties to the Convention, the lower court, in interpreting "international transportation" as defined in Article 1(2)[5] held the flight was not subject to the terms of the treaty. This because "the place of departure and the place of destination" were not "situated within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party." A divided Court of Appeal reversed the lower court upon the grounds the transportation, irrespective of the number or format of the passenger tickets, contemplated a round trip in which, for the purposes of Article 1, London was the passenger's place of destination as well as his place of departure. Although the *Grein* case was cited with approval by the panel, 756 F.2d 265, a different result was reached by the Supreme Court of British Columbia in 1961, *Stratton v. Trans-Canada Air Lines* (Brit. Col. Sup. Ct. 1961) 27 D.L.R.2d 670, unoff. Rptd., 7 Avi CCH 17,724, *app. dism.* (Brit. Col. Ct. App. 1962), 32 D.L.R.2d 736. There, the Canadian court held a separately ticketed domestic flight was excluded from the Convention's coverage notwithstanding the fact that reservations therefor were made by the passenger with the carrier when he changed his itinerary while still in the United States.

It is significant to note that the issue in the *Grein* and *Stratton* cases related to the applicability of the treaty under Article 1, an issue that is substantially different from the propriety of a forum for the purposes of Article 28.

When the Imperial Airlines disaster occurred nearly fifty-two years ago, only twenty-one nations adherred to the Warsaw Convention. Today, the vast majority of the nations of the world are High Contracting Parties, including most, if not all, of those that have emerged since decolonization after World War II. Well over one hundred, many once thought of in the words of the British delegate, as "far-off countries", are now signatories to the Treaty, *Aeronautical Statutes and Related*

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5 See Appendix for text of Article 1.

Material, Revised Dec. 31, 1974, compiled by the Office of the General Counsel of the Civil Aeronautics Board, pp. 509-512.

Under the circumstances of decedent Lazcano's transportation, involving a flight between two countries that have been High Contracting Parties to the treaty for over a half century, it makes little or no sense to exclude the United States as a contractual forum. This is particularly true when the decedent passenger died in a crash while enroute to the United States after being accepted by the carrier upon his surrender of a ticket coupon listing New York as his "place of destination". The surrender of the ticket coupon is significant because the contract of carriage was not consummated until decedent boarded respondent's aircraft and surrendered the ticket coupon pertinent to the transportation expressed thereon; *i.e.*, Madrid to New York via Malaga, *French Cour de Cassation*, 9.3.42 D.P. (1942) 2.62 R.G.D.A. 1946, p. 91, cited and quoted by H. Drion, *Limitations of Liabilities in International Air Law*, the Hague, M. Nighoff (1954), at pp. 283-284.

Since decedent's return flight from New York to Madrid was subject to a ticket separately issued in a separate ticket booklet, that portion of his transportation remained unconsummated whether subject to a single contract of carriage as found by the lower courts or to a separate contract as urged by petitioner. This because decedent, having no need to surrender it for the flight to New York, retained the separately issued booklet and ticket coupon expressing "Madrid" as his "place of destination".[6]

A more flexible interpretation of "destination", as used in Article 28(1), was expressed by J. Takasugi in *Hurley v. KLM Royal Dutch Airlines* (C.D. Cal. 1983), 562 F.Supp 260 (va-

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6 Although there is a separate ticket coupon for each leg of a passenger's journey, the entire itinerary is ordinarily contained on each ticket coupon, including the location designated "place of destination". The ticket coupon surrendered by petitioner's husband listed "New York" not "Madrid" as decedent's "place of destination."

cated 602 F.Supp. 1249 pursuant to a settlement agreement between the parties),[7] at page 261:

> "In the absence of controlling case law in the Ninth Circuit, this Court adopts a common sense interpretation and understanding of the term "destination". This court concludes that in the context of a round trip ticket, at least two places of destination exist . . ." [citing *Aanestad v. Air Canada, Inc.* (C.D. Calif. 1975 per J. Hall), 390 F.Supp 1165, 1168].

After acknowledging that the rule is different in the Second and Third Circuits, J. Takasugi observed at 261:

> ". . . [D]efendant has failed to present any evidence that the other contracting countries to the Warsaw Convention have adopted the 'ultimate destination' interpretation advanced by defendant. Finally, in light of the current marketing schemes utilized by airlines in promoting and selling round trip tickets, this court concludes that it would be unrealistic and impractical to adopt the mechanical and inflexible interpretation advanced by defendant".

It cannot be reasonably said that J. Takasugi's "common sense interpretation" of Article 28(1) is at logger heads with the letter or spirit of the Warsaw Convention. Indeed, since "a treaty, whether construed strictly or liberally, must be interpreted to effect its evident purpose", *Reed v. Wiser* (2d Cir. 1977), 555 F.2d 1079, 1088, *cert. denied*, 434 U.S. 922, it is respectfully submitted that J. Takasugi's interpretation of "destination" is the only interpretation that truly reflects the original intent of those who drafted the Warsaw Convention.

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7 The attorneys for Respondent Spantax, S.A. represented defendant KLM in the *Hurley* case as well as defendant air carriers in the *Butz* and *Gayda* cases. See Appendix for a copy of the Settlement Agreement vacating J. Takasugi's opinion order.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
June 26, 1985

Respectfully submitted,

FRANK H. GRANITO, JR.
200 Park Avenue
New York, New York 10166
(212) 661-0011

Counsel for Petitioner

Of Counsel:

SPEISER & KRAUSE, P.C.

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 247 — August Term, 1984

(Argued: October 18, 1984 Decided: February 28, 1985)

Docket No. 84-7540

MARIA DE LA LASTRA PETRIRE,
Plaintiff-Appellant,

v.

SPANTAX, S.A.,
Defendant-Appellee.

Before:

NEWMAN, CARDAMONE, and DAVIS,* *Circuit Judges.*

Appeal from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge) dismissing a suit against defendant for lack of subject matter jurisdiction. 577 F. Supp. 1013.

Affirmed.

Frank H. Granito, Jr., New York, N.Y. (Mark A. Pullano, Speiser & Krause, P.C., New York, N.Y., on the brief), for plaintiff-appellant.

* The Honorable Oscar H. Davis of the United States Court of Appeals for the Federal Circuit, sitting by designation.

Michael J. Holland, New York, N.Y. (Condon & Forsyth, New York, N.Y., on the brief), for defendant-appellee.

JON O. NEWMAN, *Circuit Judge:*

This appeal presents a narrow issue arising under the Warsaw Convention:[1] Where one carrier issues two ticket booklets for a round-trip journey, is the "destination" for purposes of the Treaty's jurisdictional provision the designated ending point of the round-trip journey or the designated ending point of the fatal travel covered by the first booklet. Maria de la Lastra Petrire appeals from a judgment of the District Court for the Eastern District of New York (Eugene H. Nickerson, Judge) dismissing, for lack of subject matter jurisdiction, her suit against Spantax, S.A., a Spanish airline. *In re Air Crash Disaster at Malaga, Spain*, 577 F. Supp. 1013 (E.D.N.Y. 1984). Because we agree with Judge Nickerson that jurisdiction was lacking on the undisputed facts of this case, we affirm.

Appellant brought suit as the widow and mother of the minor children of Carlos Conrado, who was killed in the crash of a Spantax aircraft as it took off from Malaga, Spain, en route to New York. Conrado had contracted with Spantax for air travel from Madrid to New York on a flight that stopped at Malaga and for a return flight from New York to Madrid. He was ticketed to return to Madrid five days after his expected arrival in New York. The ticketing was accomplished at the

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[1] Convention for Unification of Certain Rules Relating to International Transportation by Air, 49 Stat. 3000, T.S. No. 876, *reprinted in* 49 U.S.C.A. § 1502 note (1976).

Madrid office of Spantax by the simultaneous issuance of two ticket booklets, consecutively numbered. The first contained two flight coupons, one for the flight from Madrid to Malaga and the second for the flight from Malaga to New York. The second booklet contained a single flight coupon for the flight from New York to Madrid.[2]

Article 28(1) of the Warsaw Convention specifies the permissible jurisdiction in which suit may be brought:

> An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court [1] of the domicile of the carrier or [2] of his principal place of business, or [3] where he has a place of business through which the contract has been made, or before the court [4] at the place of destination.

Appellant concedes that the first three locales specified in Article 28(1) would require her to bring suit in Spain. However, she asserts the right to sue in the United States[3] because New York was the destination listed on Conrado's Madrid-New York ticket.

Appellant does not dispute that, for purposes of the Warsaw Convention, the "destination" of a round-trip

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[2] Spantax submitted an affidavit of the ticketing clerk at Madrid, who stated that he used two booklets because (a) his supply that day did not include booklets with more than two ticket coupons and (b) he used up one booklet by issuing coupons for travel from Madrid to Malaga and from Malaga to New York. Whether or not this was his reason, which appellant disputes and we need not decide, the facts concerning the time and place of issuance of the two booklets and the dates of the intended travel are undisputed.

[3] Article 28 concerns jurisdiction on the "national level." *Smith* v. *Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 801 (2d Cir. 1971).

journey is the same as the starting point—in this case, Spain. *Butz* v. *British Airways*, 421 F. Supp. 127, 130-31 (E.D. Pa. 1976), *aff'd mem.*, 566 F.2d 1168 (3d Cir. 1977); *Grein* v. *Imperial Airways, Ltd.*, [1936] 1 K.B. 50, 1 Av. Cas. (CCH) 622 (1936); *see* R. Mankiewicz, *The Liability Regime of the International Air Carrier* § 32, at 30 (1981). Her point, however, is that the "destination" of a journey must be determined from the terms of the ticketing contract and that in this case the ticket booklet for travel from Madrid to New York was the pertinent contract.

There is no doubt that a "destination" is to be determined from the contract for transportation, whether the destination is pertinent to national jurisdiction under Article 28, *Gayda* v. *LOT Polish Airlines*, 702 F.2d 424 (2d Cir. 1983), or to the international nature of a journey and the consequent application of the Treaty, *Grey* v. *American Airlines*, 95 F. Supp. 756 (S.D.N.Y. 1950), *aff'd*, 227 F.2d 282 (2d Cir. 1955), *cert. denied*, 350 U.S. 989 (1956). What is less clear is determination of the pertinent contract and the pertinent transportation.

In the District Court, Judge Nickerson took the sensible approach of ruling that at least in this case where it was undisputed that two ticket booklets were issued sequentially at the same time and the same place for round-trip travel to be interrupted by no more than a five-day stopover, a single contract had been made. The already fine distinctions that have developed in construing the Warsaw Convention would become absurd if the existence of a single contract turned on whether the three coupons issued for travel in this case were enclosed in one or two booklets, or whether a second

booklet was used because the ticketing agent did not have on hand a ticket booklet with more than two coupons, or whether the two booklets were stapled together. What should matter when determining whether two or more ticket booklets constitute a single contract for purposes of the Treaty are the time and place of issuance of the booklets and the contemplated degree of continuity of the journey being ticketed. We need not attempt to formulate a general test to fit all of the combinations of relevant facts that might arise. It suffices to agree with Judge Nickerson that a single contract existed on the undisputed facts of this case. Appellant makes no claim that Conrado intended to purchase only a ticket from Madrid to New York and was issued a return ticket by mistake.

Determining the matter on the basis of when and where the booklets were issued and the nature of the journey contemplated accords with the scheme of the Treaty. Article 1(2) defines "international transportation" with reference to the place of departure and place of destination of any "transportation," and Article 1(3) elaborates on that term as follows:

> Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts . . . .

Plainly, when different carriers are involved, the pertinent unit of travel for determining the "destination" is the "single operation" of "undivided transportation" as "regarded by the parties," whether that transportation is

ticketed in one or a series of contracts. *See Pimentel* v. *Bland*, 748 F.2d 94, 96-97 (2d Cir. 1984).[4] When the transportation is to be performed by a single carrier, it would make little sense to use a different approach and let the number of contracts determine the "destination." In this case the undisputed facts show a "single operation" of "undivided transportation" as "regarded by the parties." The objective facts of the ticketing, which justified Judge Nickerson in concluding that only one contract existed, also support the conclusion that there was one "transportation" within the meaning of the Treaty. The destination of that transportation was Madrid.

Appellant contends that an air traveler should not be deprived of the option of purchasing "two one-way tickets for the purpose of assuring Article 28 jurisdiction in a desired national venue." Brief for Appellant at 15. She relies on language in *Lisi* v. *Alitalia-Linee Aeree Italiane, S.p.A.*, 370 F.2d 508 (2d Cir. 1966), *aff'd by an equally divided court*, 390 U.S. 455 (1968), pointing out that a passenger must be given notice of the Treaty's limitations of liability so that he may have "the opportunity to purchase additional flight insurance or to take such other steps for his self-protection as he sees fit." *Id.*

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[4] Separate contracts with separate destinations were held to exist when a second booklet was purchased six weeks after the first booklet, at a different city, and for travel to a different destination than was contemplated when the first booklet was issued. *Stratton* v. *Trans Canada Air Lines*, 27 D.L.R.2d 670, 7 Av. Cas. (CCH) 17,724 (Brit. Col. Sup. Ct. 1961), *appeal dismissed*, 32 D.L.R.2d 736 (Brit. Col. Ct. App. 1962). On the other hand, a single contract was held to exist when six ticket booklets each containing four coupons were issued at one place and one time for a round-the-world journey with various stopovers. *Vergara* v. *Aeroflot "Soviet Airlines,"* 390 F. Supp. 1266 (D. Neb. 1975).

at 513. Even if we were to assume that a passenger might wish to select the number of ticket booklets for his journey in order to try to make available a forum in the country where the travel covered by one booklet is scheduled to terminate, such a maneuver is not the "self-protection" contemplated by *Lisi*.[5] An expressed preference for two ticket booklets cannot change the unitary nature of either the resulting contract or the transportation being ticketed. On the facts of this case, whether or not two ticket booklets were requested (and there is no claim that they were), there was only one contract and one transportation.

The judgment of the District Court is affirmed.

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[5] If an air traveler wishes to take steps in contemplation of the hazards of flying not only by purchasing insurance but also by assuring that suit may be brought in a particular country, he usually has the option of traveling on a carrier whose domicile or principal place of business is located in that country.

Opinion by the United States District Court Eastern District of New York

UNITED STATES DISTRICT COURT
EASTERN DISTRICT NEW YORK

Jan. 30, 1984

In re AIR CRASH DISASTER AT MALAGA, SPAIN ON SEPTEMBER 13, 1982

This Order Relates to:

Lazcano, 83 C 1264, Araque 83 C 1486.

Nos. 83 C 1264, 83 C 1468. MDL 530.

Airline moved to dismiss complaints for lack of subject matter jurisdiction under Warsaw Convention, which all parties agree governed suit arising out of air crash. The District Court, Nickerson, J., held that place of destination, for purposes of determining jurisdiction, was Spain for passenger who purchased two tickets in single transaction for travel from Spain to New York and back to Spain, with a stop in New York for only a few days; however, for passenger who purchased ticket from Spain to New York, New York was place of destination.

Motion granted in part and denied in part.

Speiser & Krause, P.C., New York City (Frank H. Granito, Jr., New York City, of counsel), for Lazcano's heirs.

Mel Sachs, New York City, for plaintiff Araque.

Condon & Forsyth, New York City (Michael J. Holland, New York City, of counsel), for defendant Spantax, S.A.

MEMORANDUM AND ORDER

NICKERSON, *District Judge*.

Defendant Spantax, S.A. (Spantax) moves to dismiss the Lazcano and Araque complaints for lack of subject matter jurisdiction under Article 28 of the Warsaw Convention, which all parties agree governs.

Article 28(1) sets forth four places only where suit may be brought. *Smith v. Canadian Pacific Airways, Ltd.*, 452 F.2d 798, 800 (2d Cir. 1971). They are the domicile of the carrier, its principal place of business, its place of business through which the contract has been made, and the place of destination. Plaintiffs concede that Spantax's domicile and principal place of business and the places of contracting are in Spain. This dispute is over the definition of "place of destination."

Spantax claims that both Lazcano and Araque entered into contracts for carriage for travel from Spain to New York and back to Spain, and that, although the airplane crashed on its take-off for New York, the "ultimate destination" was Spain. Spantax has submitted copies of the tickets purchased showing Madrid, Spain to be the final destination.

Lazcano's heirs argue that Spantax issued to him not a round-trip ticket but two separate one-way tickets, one for the flight of Madrid to Malaga to New York, the other for New York to Madrid. He was traveling from Malaga to New York when the crash occurred. Plaintiffs also argue that the "planned destination" of the ill-fated flight is sufficient to give jurisdiction.

Spantax says that Lazcano received two tickets rather than a single round-trip ticket because its clerk had in his possession "passenger ticket and baggage checks . . . with only two passenger coupons," Pascual affidavit ¶ 4, an insufficient number for the series of flights. Plaintiffs object to any reliance on the affidavit calling its recital of a direction given Pascual by the president of Spantax hearsay, and its recounting of the transaction with the decedent incompetent under New York's Dead Man Statute, N.Y.Civ.Prac.Law § 4519.

Araque asserts that, regardless of what her ticket read, she purchased only a one-way ticket from Madrid to New York. Her affidavit states that she lives in New York, took a vacation in Spain from June to September, and had no intention of returning to Madrid. She paid approximately $200 for her return flight to New York, presumably the price of a one-way ticket.

The Second Circuit stated that "for Article 28 purposes it is the 'ultimate' destination listed in the contract for carriage that controls." *Gayda v. LOT Polish Airlines*, 702 F.2d 424, 425 (2d Cir. 1983). In that case, the decedent's passenger ticket was for a Poland to New York to Poland trip, and plaintiffs conceded that Poland was the destination of the contract of carriage. In determining that the stop in New York was not significant, the Court of Appeals cited *Butz v. British Airways*, 421 F.Supp. 127 (E.D.Pa.1976), *aff'd without opinion*, 566 F.2d 1168 (3d Cir. 1977), which noted that the Article 28 "place of destination" in a trip consisting of several parts is the ultimate destination. *Id.* at 130. In that case, plaintiff had purchased a round-trip ticket, London to New York to London; the court held that, although he was injured as the airplane landed in New York, London was the place of destination.

Although the courts appear not to have addressed the issue, there is no reason why the simultaneous issuance of two separate tickets rather than one round-trip ticket should make a difference. As in the *Gayda* case, *supra*, New York was to be only a stopping point before Lazcano's clearly-intended return to Spain. Plaintiffs do not dispute that Lazcano bought the tickets at the same time and place. Indeed, they are consecutively numbered from Spantax stock. Nor do plaintiffs dispute that the contract for carriage was made in a single transaction for travel from Spain to New York and back to Spain, with the stop in New York for only a few days. As the Court of Appeals stated in the *Gayda* case, it is the ultimate destination listed in the contract for carriage that governs. The contract of carriage can consist of more than one piece of paper.

Pascual's explanation as to why he issued two tickets is plausible in light of the additional stopover in Malaga, but there is no need to consider whether the reasons he gave for the fact that he issued two rather than one are accurate.

Araque's situation is different. The facts she presented in her affidavit indicate that New York and not Spain was her intended ultimate destination. It is true that the ticket shows a trip of Madrid-New York-Madrid. However, she claims that she did not notice what the ticket read when she bought it and does not know why Madrid was inserted as the final leg. The court does not consider that the *Gayda* decision precludes either the passenger or the carrier from showing that certain terms in the purported contract of carriage arose from a mutual mistake.

Spantax's motion is granted as to the Lazcano complaint and denied as to the Araque complaint. So ordered.

Order Denying Reargument

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 84-7540

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 8th day of April one thousand nine hundred and eighty-five.

MARIA DE LA LASTRA PETRIRE, individually, as surviving wife and on behalf of the Heirs at Law and Distributees of the Estate of CARLOS LAZCANO CONRADO, Deceased, MARIA LAZCANO DE LA LASTRA, CARLOS LAZCANO DE LA LASTRA, INIGO LAZCANO DE LA LASTRA and VICTORIA LAZCANO DE LA LASTRA, infant children of CARLOS LAZCANO CONRADO, Deceased, by their mother and natural guardian MARIA DE LA LASTRA PETRIRE,

Plaintiffs,

MARIA DE LA LASTRA PETRIRE,

Plaintiff-Appellant,

v.

SPANTAX, S.A.,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Maria De La Lastra Petrire,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Stipulation and Order in Hurley v. KLM

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 82-6258 RMT (Kx)

JUNE HURLEY,

Plaintiff,

vs.

KLM ROYAL DUTCH AIRLINES, and DOES I-XX, inclusive,

Defendants.

ORDER

IT IS HEREBY ORDERED that this Court's Order of April 11, 1983, reported as *Hurley v. KLM Royal Dutch Airlines*, 562 F. Supp. 260 (C.D. Cal. 1983), be vacated.

Dated: February 15, 1985

/s/ ROBERT M. TAKASUGI
Robert M. Takasugi
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

Case No. CV 82-6258 RMT (Kx)

JUNE HURLEY,

Plaintiff,

vs.

KLM ROYAL DUTCH AIRLINES, and DOES I-XX, inclusive,

Defendants.

STIPULATION FOR DISMISSAL

PURSUANT TO RULE 41(a)(1) OF THE FEDERAL RULES OF CIVIL PROCEDURE:

IT IS HEREBY STIPULATED by and between the parties hereto through their respective counsel herein, that the above-entitled action be dismissed with prejudice, each party to bear its own costs.

IT IS FURTHER STIPULATED by and between the parties herein that the Order of the Court regarding defendant KLM Royal Dutch Airlines' Motion to Dismiss or in the Alternative for Summary Judgment, heard on March 28, 1983, decided on April 11, 1983, reported as *Hurley v. KLM Royal Dutch Airlines*, 562 F. Supp. 260 (C.D. Cal. 1983), be vacated.

Dated: February 12, 1985

CONDON & FORSYTH

By: /s/ ROD D. MARGO
Rod D. Margo
David A. Senior
Attorneys for Defendant
KLM ROYAL DUTCH AIRLINES

Dated: February 11, 1985

By: /s/ WILLIAM J. MCCRACKEN
William J. McCracken
Attorneys for Plaintiff
June Hurley

IT IS SO ORDERED.

Dated: February 15, 1985

/s/ ROBERT M. TAKASUGI
Robert M. Takasugi
United States District Judge

Warsaw Convention, Chapter I, Article I

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.